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K GRESHAM

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER,

Defendant.

CAUSE NO. P1300CR201001325

STATE'S MEMORANDUM
RE: GREGG CURRY EX PARTE
UNDER SEAL HEARING

Assigned to Hon. Gary Donahoe

The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and her deputy undersigned files this memorandum concerning the *ex parte* under seal hearing for the Gregg Curry fee dispute. This brief is supported by the following memorandum of points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

Facts:

On August 10, 2011, Defendant filed his Motion for Rule 15.9 Re-Appointment of Gregg Curry and Navigant Consulting, Inc. Defendant stated that due to an ongoing funding dispute, the current contract administrator had denied funding for Curry and Navigant. On January 30, 2012, Defendant advised by motion that "there is a continuing funding issue regarding Mr. Curry."

1 On February 8, 2012, counsel for Defendant indicated that Curry and Navigant were owed
2 \$44,000.00 and that Curry and Navigant refused to do any further work on this case until this
3 amount was paid. The Court indicated that if this matter was not resolved, presumably by the
4 parties, the Court may strike the State's forensic accounting expert.

5 On February 24, 2012, the Court overruled the State's objection to hold the instant hearing
6 *ex parte* and under seal. Since the hearing may involve discussions of attorney/client and work
7 product matters the State's attendance was precluded. The Court scheduled an *ex parte* and under
8 seal hearing on the reasonableness of Navigant's bill for March 5, 2010 at 10:00 a.m.

9 **Legal Authority and Analysis:**

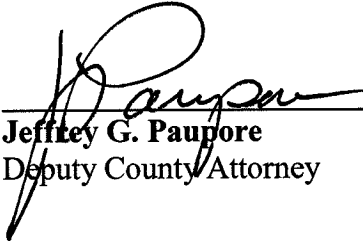
10 Arizona Code of Judicial Conduct, Rule 81, Canon 2, Rule 2.9 state a judge shall not
11 initiate, permit, or consider *ex parte* communications or consider other communications made to
12 the judge outside the presence of the parties or their lawyers, concerning a pending or impending
13 matter except when circumstances require it. Ethical rule 3.5, provides, in pertinent part: "[a]
14 lawyer shall not . . . communicate *ex parte* with [a judge] during the proceeding unless authorized
15 to do so by law or court order" or otherwise "engage in conduct likely to disrupt a
16 tribunal." Considering the history of this case, it can be safely said that neither the Court, the
17 Defendant or the State want to go down another path of *ex parte* under seal hearings. However,
18 the circumstances require it. The question then what is the best way to proceed from here? The
19 State recommends the trial judge not participate in this *ex parte* under seal hearing because "any
20 [such] communication may allow the judge to be improperly influenced or inaccurately
21 informed." *McElhanon v. Hing*, 151 Ariz. 403, 409 (1986) citing, *In Re Conduct of Burrows*, 291
22 Or. 135, 145, 629 P.2d 820, 826 (1981). The best course of action is to have this hearing before
23 another judge.
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1 **CONCLUSION:**

2 The Curry matter should be heard by a judge other than the trial judge.

3
4 **RESPECTFULLY SUBMITTED** this 2nd day of March, 2012.

5 **Sheila Sullivan Polk**
6 **YAVAPAI COUNTY ATTORNEY**

7
8 By: 
9 **Jeffrey G. Paupore**
10 Deputy County Attorney

11 **COPY** of the foregoing **Emailed** this
12 2nd day of March, 2012, to:

13 Honorable Gary Donahoe
14 Division 1
15 Yavapai County Superior Court
16 Via email to: gdonahoe@courts.az.gov

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